LAW AND CONTEMPORARY PROBLEMS

Volume 56 Spring 1993 Number 2

FOREWORD

WILLIAM A. REPPY, JR.*

Although this symposium issue is devoted to community property topics, attorneys, judges, and scholars from equitable distribution states will find a wealth of pertinent material in the articles because equitable distribution is so firmly rooted in community property theory.[1] All[2] of the forty-two noncommunity property jurisdictions in the United States now have in place a process for equitable distribution of property at divorce that borrows to some degree from the partnership theory of community property. As I have noted elsewhere, however, equitable distribution jurisdictions must consider certain points of difference in assessing the applicability of community property precedents. For example, the fact that community property regimes must deal with the problems of management and creditors' rights that arise out of recognition of co-ownership during, and not just at the end of, the marriage has caused community property jurisdictions to be cautious in considering assets appropriate for community classification when such caution is not required in equitable distribution states.[3]

Two articles in the symposium focus on the history of Texas community property law to highlight another point that equitable distribution states must consider in assessing community property precedents: peculiar local institutions that have warped the development of marital property theory. Such local-law impediments have existed in Texas more than in any other community property state. Professor Joseph McKnight[4] traces how a senselessly rigid interpretation of a provision in the Texas constitution referring to a married woman's separate property has been a strait-jacket hampering development of community property

* Charles L.B. Lowndes Professor of Law, Duke University School of Law.

1. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 591-92 (2d ed., 1988); JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION ¶ 1.02 (1989).

2. I have seen some writers list Mississippi as one state not employing equitable distribution at divorce. A recent article discloses, however, that under the rubric of lump sum alimony and/or implied economic partnership between husband and wife, Mississippi divorce courts effectively apply equitable distribution principles. Thomas W. Crockett & J. Randall Patterson, *Dividing the Property in a Marital Dissolution*, 62 MISS. L.J. 57 (1992).

3. William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L. Q. 163 (1989).

4. Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71 (Spring 1993).

law. Professor James Paulsen[5] traces the history of Texas's no alimony rule—a bar unique to Texas among the fifty-one American jurisdictions. His article discloses the bar to be less of a factor in directing the marital property regime of Texas in unusual directions than the state constitutional provision has been, but still a factor that equitable distribution states should assess when considering application of Texas precedent to an issue arising in the equitable distribution context.

The articles by Professor Thomas Andrews[6] on treatment of rents and profits from separate property and by Professor Grace Ganz Blumberg[7] on valuing professional goodwill as community property deal with basic principles of classification. The issue of classifying as "separate" or "community" in community property states is directly analogous to the issue of treatment as marital or nonmarital property (or divisible versus nondivisible property) in the common law states. It is in the broad area of classification that one would expect the common law states to cite most frequently to community property precedents. As a small test of this intuitive conclusion, I conducted a Westlaw search of citations in the common law jurisdictions of forty significant community property cases.

Just over half of the forty cases dealt primarily with classification issues, the rest with management powers, liability for mismanagement, methods of uncommingling, rights of reimbursement, and so on. As I expected, the most frequently cited by common law courts of the forty community property cases dealt with classification. By far the most cited case was *Nail v. Nail*,[8] which held that the professional goodwill of an unincorporated sole practitioner spouse was incapable of being community property. *Nail* is cited twenty-four times in eighteen common law states.[9]

The third most cited of my forty cases[10] also dealt with an issue of classification—classification of tort recoveries, a problem often not directly addressed by equitable distribution statutes and thus left to the courts to resolve based on general theories for distinguishing marital and nonmarital estates.[11] Of the second and the fourth through seventh most cited cases in my survey, two dealt

---

5. James W. Paulsen, *Remember The Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7 (Spring 1993).

6. Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 LAW & CONTEMP. PROBS. 171 (Spring 1993).

7. Grace Ganz Blumberg, *Identifying and Valuing Goodwill at Divorce*, 56 LAW & CONTEMP. PROBS. 217 (Spring 1993).

8. 486 S.W.2d 761 (Tex. 1972).

9. As Professor Blumberg's article demonstrates, *Nail* is an erroneous holding. I found it cited in the common law states in seminal decisions on the issue of goodwill as marital property as a leading case for a minority rule pressed upon the divorce court by the professional spouse only to be rejected as unsound. Of the 24 cases citing *Nail*, all but four declined to follow it.

10. Marriage of Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984) (eight cites in seven common law states).

11. *See* Willard H. DaSilva, *Property Subject to Equitable Distribution, in* 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY 18-1, § 118.05[5] (John P. McCahey ed., 1984).

with classification directly[12] and three dealt with classification as affected by problems of commingling and uncommingling.[13]

I also had anticipated that community property precedents dealing with apportionment of gains resulting from community labor applied to separate capital would have been often cited,[14] but they were not. Most of the precedents in this area are from states where rents and profits accruing during marriage from separate capital are similarly separate property. California's leading case in this area[15] has acquired but a single cite (from Missouri) from common law states. The most-cited case in this area—three citations—is *Cockrill v. Cockrill* from Arizona.[16]

In four community property states, rents and profits from separate capital are, ordinarily, community rather than separate property.[17] Their courts have produced few precedents on the problem of distinguishing increase from inflation and other natural causes from profits (and increase due to community labor). Of four significant community property cases dealing with this issue, only one is cited in common law states.[18] This is partly explained by the fact that among common law states the analogous rule that rents and profits from nonmarital property are marital is a distinct minority position.[19]

Equitable distribution states also must grapple with the appropriate remedy for situations where one estate has contributed to the increase in value of the other but under the fixtures doctrine has acquired no share of ownership, for example, where nonmarital funds are used to build a structure on land that is

---

12. Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), *overruled in* Marriage of Lucas, 27 Cal.3d 806, 166 Cal. Rptr. 853, 614 P.2d 285 (1980) (classifying residence acquired by payments over time) (11 cites in nine states); Sims v. Sims, 358 So. 2d 919 (La. 1978) (apportioning pension earned partly before, partly during marriage into separate and community shares) (seven cites in five states); Marriage of Lucas, 27 Cal. 3d 841, 166 Cal. Rptr. 853, 614 P.2d 285 (1980) (effect of title on classification) (five cites in four states).

13. Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 209 (1980) (effect of using community funds to make purchase money mortgage payment after separate funds used for down payment) (five cites in four states); See v. See, 64 Cal. 2d 778, 51 Cal. Rptr. 888, 415 P.2d 776 (1966) (use of the family-expense doctrine to uncommingle account containing community and separate funds).

14. I had also expected the equitable distribution states' courts to be citing to three classic community property cases long used as teachers' tools to illustrate that (a) property acquired by bequest or devise may be community if the will was written pursuant to contract, Andrews v. Andrews, 116 Wash. 513, 199 P. 981 (1921); (b) gains from a contract made during marriage are separate property if the contracting spouse used his status as heir to negotiate the deal, Estate of Clark, 94 Cal. App. 453, 271 P. 542 (1928); and (c) a gift to both spouses can be community property rather than tenancy in common property, Estate of Salvini, 65 Wash. 2d 442, 397 P.2d 811 (1964). Yet none of the three cases is cited in a common law jurisdiction for a holding relating to community property law.

15. Beam v. Bank of America, 6 Cal. 12, 490 P.2d 2157, 98 Cal. Rptr. 137 (1972).

16. 124 Ariz. 50, 601 P.2d 1334 (1979).

17. *See* Andrews, *supra* note 6, at 171 n.3 (Idaho, Louisiana, Texas, and Wisconsin).

18. Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973) (three cites).

19. Five common law states follow this minority approach. Emily Osborn, Comment, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 915-16 (1990). Arkansas is listed in the Comment as one, but its statute excludes rents and profits from nonmarital property from the marital estate. ARK. CODE. ANN. § 9-12-315(b)(7). At least two of the four other states cited have recognized the problem of apportioning marital profits from nonmarital gain due to inflation and other natural conditions: Smith v. Smith, 497 S.W.2d 418 (Ky. 1973); Meservy v. Meservy, 841 S.W.2d 240 (Mo. App. 1992).

marital property. Most community property cases resolve these problems under the law of reimbursement, which equitable distribution states can apply by analogy. Hence the article in this symposium, written by Professor Cynthia Samuel,[20] on difficulties Louisiana has had with reimbursement cases, is not just of interest to readers from Louisiana. My search revealed, however, that five significant reimbursement decisions from Arizona, California, Texas, and Washington, including *Anderson v. Gilliland*,[21] had generated only one citation from common law states, a Missouri cite to *Marriage of Elam*.[22]

In large measure, the laws of community property states concerning management of community assets by husband and wife are not applicable by analogy in common law jurisdictions even in instances of a couple there co-owning property in tenancy in common, joint tenancy, or tenancy by the entirety. That is because the basic rule in community property states is that each spouse has management over the entire asset (if personalty), whereas with tenancy in common and joint tenancy, a spouse manages only his or her half interest. However, the modern common law rule that joint action of both spouses is necessary to convey or encumber tenancy by the entireties property is similar to the rule in seven community property states applied to community realty. A computer search for citations to four useful community property cases dealing with avoidance of joinder by one spouse under theories of estoppel or ratification revealed none in common law jurisdictions.

An equally obvious analogy equitable distribution states might draw involves the case where, after separation, a spouse who is sole owner of marital (divisible) property by mismanagement causes it to be devalued, squanders it, or suffers its unexplained disappearance. Even though community property is co-owned, when it was (before gender-neutralizing reform) subject to management solely by the husband, similar problems arose in community property states. Two on-point California cases in this mold had not been cited, I learned, in equitable distribution states. Texas retains single-spouse management of his or her uncommingled earnings,[23] and a Texas case decided under this approach to management involving community property disappearing on the eve of divorce acquired one citation in a common law state.[24] Other examples could be laid out to illustrate how attorneys in and scholars of equitable distribution systems will find much of value in Professor Thomas Oldham's[25] detailed survey of

---

20. Cynthia Samuel, *Restoration of the Separate Estate from Community Property After the Equal Management Reform: Some Thoughts on Louisiana's Reimbursement Rules*, 56 Law & Contemp. Probs. 273 (Spring 1993).

21. 684 S.W.2d 673 (Tex. 1985) (reimbursement available for greater of value added or amount spent, overruling Spanish-based cases choosing the lesser of these figures).

22. 97 Wash. 2d 811, 650 P.2d 213 (1982) (improving estate shares in inflationary gain enjoyed by entire property based on amount spent to improve).

23. TEX. FAM. CODE § 5.22(a).

24. Reaney v. Reaney, 505 S.W.2d 338 (Tex. Civ. App., Dallas, 1974, no writ)(concerning what kind of squandering of community property by a manager spouse imposes liability) (cited in New Jersey).

25. J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99 (Spring 1993).

management and control[26] statutes and implementing cases in the nine community property states.

When a marriage ends by death of a spouse, the common legal issues shared by community property and common law states are fewer than at divorce, but there are several. Professor Carol Bruch's[27] article in this symposium explores one of them: whether a testator spouse can avoid forced heirship laws—those that provide a surviving spouse a nonbarrable share of property owned by the decedent—of his domicile by a provision in his will purporting to make the law of another jurisdiction controlling. Since *all* common law states but only five[28] of the nine community property states provide forced heirship rights to surviving spouses, Professor Bruch's article is the one in the symposium most clearly of concern to readers not practicing in or studying the laws of a community property jurisdiction.

---

26. This phrase is not redundant, as control refers to one spouse's veto power over the management decision of the other.

27. Carol S. Bruch, *The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons: Do Quasi-Community Property and Mandatory Survivorship Laws Need Protection?*, 56 LAW & CONTEMP. PROBS. 309 (Spring 1993).

28. California (where the divorce law term quasi-community property has become associated with the doctrine), Idaho (via its adaptation of the Uniform Probate Code), Louisiana, Washington, and Wisconsin (where the theory is a deferred community regime). The new Louisiana statute applies quasi-community property theory—a forced heir's claim equivalent to a nonacquiring spouse's ownership rights in movables onerously acquired while the couple were domiciled in a common law state—to a half interest in the decedent's property. Under quasi-community property theory, the surviving spouse would have no forced heir's rights (other than a marital portion claim) in the other half, which would be treated as if it always had been Louisiana separate property. But Louisiana Civil Code article 3526 allows the surviving spouse to additionally claim in that half a forced heir's share under the laws of the former domicile of the spouse at the time of acquisition. The marital portion is available only if the decedent dies rich in comparison to the wealth of the surviving spouse. LA. CIV. CODE art. 2432.